

APPEAL NO. 021245
FILED JUNE 28, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on May 1, 2002. With regard to the three issues before him, the hearing officer determined that (1) the respondent/cross-appellant's (claimant) compensable lumbar spine injury extends to include an injury at the L4-5 level (the appellant/cross-respondent (carrier) accepted liability for an L5-S1 level); (2) the claimant is not entitled to supplemental income benefits (SIBs) for the first quarter; and (3) the carrier has not waived its right to contest the claimant's entitlement to first quarter SIBs.

The carrier appeals the extent-of-injury issue, arguing that the compensable L5-S1 injury did not affect the L4-5 level, which has only degenerative changes. The claimant appeals the hearing officer's determination on the carrier waiver issue and only the entitlement to SIBs as it relates to the carrier's alleged waiver to contest entitlement to SIBs for the first quarter. Both parties respond to the other's appeal.

DECISION

Affirmed.

Regarding the extent-of-injury issue, the parties stipulated that the claimant had a compensable lumbar spine injury on _____. The claimant had a discectomy and fusion at L5-S1 on January 7, 2000. The claimant contends that the compensable injury and spinal surgery was "a producing cause of a pathology at L4-5," while the carrier contends that the L4-5 disc reflects a chronic degenerative condition. There was conflicting medical evidence, which is summarized in the hearing officer's Statement and Discussion of the Evidence. After review of the record, including the reports of the three doctors, we conclude that there is sufficient support for the hearing officer's decision on this issue. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The claimant's appeal of the waiver issue presents what we believe to be a case of first impression on a question of law. The parties stipulated that the qualifying period for the first quarter was July 18 through October 16, 2001. Other pertinent, undisputed facts are that during the qualifying period, the claimant earned wages at least equivalent, or greater, than his preinjury wage; that the claimant, as of the CCH, has not filed an Application for [SIBs] (TWCC-52); and that the Texas Workers' Compensation Commission (Commission), by letter dated November 19, 2001 (after the qualifying period), made a determination of nonentitlement to SIBs for the first quarter. The claimant nonetheless asserts entitlement (although conceding he is not eligible for payment) to SIBs for the first quarter based on Section 408.147(b), which states:

- (b) If an insurance carrier fails to make a request for a benefit review conference [BRC] within 10 days after the date of the expiration of

the impairment income benefit [IIBs] period or within 10 days after receipt of the employee's statement, the insurance carrier waives the right to contest entitlement to [SIBs] and the amount of [SIBs] for that period of [SIBs].

The claimant's position, as verified in questioning by the hearing officer, is that a BRC must be requested for every claimant who has an impairment rating of 15% or higher and has not commuted IIBs, and that since the carrier in this case did not request a BRC within 10 days after the expiration of the IIBs period, the claimant retains his entitlement rights for that quarter. The hearing officer, in his discussion, speculates on the claimant's motive in pursuing this path.

We believe that Section 408.147 must be read in its entirety. That section is entitled "Contest of [SIBs] by Insurance Carrier" and Section 408.147(a) provides that a carrier "may request" a BRC to contest entitlement and amount of SIBs. Tex. W.C. Comm'n, TEX. ADMIN. CODE § 130.103 (Rule 130.103) provides that the Commission shall make a determination of entitlement or nonentitlement for the first quarter of SIBs not later than the last day of the IIBs period (which, admittedly, was not done in this case). As the carrier points out, Rule 130.107 provides that only after the Commission's initial determination of entitlement is the carrier to pay SIBs, and Rule 130.108(a) provides that the carrier is not to dispute entitlement to SIBs "without a factual or legal basis" to do so. We believe the 1989 Act and implementing rules should be read harmoniously in so far as possible. In this case, we reject the claimant's contention that Section 408.147(b) requires a carrier to request a BRC within 10 days of the expiration of the IIBs period, regardless of the Commission's (belated) initial determination of entitlement to SIBs and the claimant's other ineligibility for SIBs at the risk of waiving the right to contest entitlement for that period. We hold that in the circumstances of this case, where the claimant is earning more than 80% of his average weekly wage, where the claimant has never filed a TWCC-52, and where the Commission's (belated) initial determination was nonentitlement to SIBs, there is no reason for the carrier to request a BRC, and its failure to do so does not establish an entitlement to SIBs for the first quarter.

Accordingly, the hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **ASSOCIATION CASUALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**HAROLD FISHER
PRESIDENT
3420 EXECUTIVE CENTER DRIVE, SUITE 200
AUSTIN, TEXAS 78731.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Robert W. Potts
Appeals Judge